IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 279 of 1982
IN
SPECIAL CIVIL APPLICATION NO. 3491 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KNATILAL ODHAVJI

Versus

UNION OF INDIA

Appearance:
MR MD RANA for Appellant
MR RM VIN for Respondent No. 1, 2

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE C.K.BUCH

Date of decision: 21/12/98

ORAL JUDGEMENT [PER : B.C.PATEL, J]

The appellant-original petitioner of Special Civil Application No. 349/82 having failed to get a relief namely to quash and set aside the order of

retiring the petitioner from service with effect from 31.1.1982, has approached this Court by present appeal. The appellant has pressed the appeal only with regard to applicability of Rule 2046(e) of Railway Establishment Code (hereinafter referred to as the Code) and not further. Appeal arises from the following facts.

The appellant was engaged by the erstwhile Bhavnagar State Railway and pursuant to formation of Western Railway in 1955, became the servant of Western Railway. It is not the case of the appellant that he joined Bhavnagar State Railway services before 31.3.1938 or Ministerial services in 1955 and hence his case would be governed by Rule 2046 of the Code. Mr. Rana, learned counsel appearing for the appellant submitted that considering the birth-date of the appellant, he was to superannuate on 31.1.1982. However, according to him, the appellant was entitled to get benefit of Rule 2046(e) of the Code in its true spirit. Said Rule 2046(e) of the Code reads as under:-

"2046(e) Railway servants in Class IV service or post who prior to 1st December, 1962, were entitled to serve upto the age of sixty years including the new entrants to those categories shall continue to serve upto the age of sixty years."

He submitted that words "who prior to 1st December, 1962 were entitled to serve upto the age of sixty years" having been struck down being discriminatory and violative of Article 14 of the Constitution of India by Patna High Court in the case of Karoo v/s Assistant Engineer, Eastern Railway Dinapur and another, 1974 Lab.I.C.1272, it was not open for the respondent authorities to ask the petitioner to get himself superannuated at the age of 58 years instead of 60 years. He submitted that in view of Apex Court's judgment, in the case of The Railway Board and another v/s A.Pitchumani, AIR 1972 SC 508, the provision has been rightly declared as violative of Article 14 of the Constitution of India by Patna High Court in the case of Karoo (supra) and in view of that decision also, the appellant should have been permitted to continue till he completed the age of sixty years. Mr. Rana, learned counsel appearing for the appellant further relied upon the decision of the Division Bench of this High Court in the case of Shri N.S. Vatsraj v/s The Union of India & others, (1976)2 SLR 601, and submitted that the words should be liberally construed and benefit of retirement at 60 years should have been given to him as is given in case of other Railway servants.

As against this, learned counsel Mr. Vin has

submitted that the petitioner and other similarly situated persons like the petitioner were engaged by the Provincial Government or Ex-Company and Ex-States running railway with a clear understanding that employee will be superannuated at the age of 58 years and with this clear understanding, the petitioner joined services. Rule 2046(a) of the Code clearly provides the age of retirement and it reads as under :-

"2046(a) Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty-eight years."

Mr. Vin submitted that exceptions are given in various sub-clauses and if case of a person does not fall within any of the proviso or exception, then as per clause (a), he is to be superannuated at the age of fifty- eight years and not at the age of sixty years as contended. He further submitted that it is well-known that so far as age of superannuation is concerned, there can be different age of superannuation in the same department. He submitted that what law prohibits is that after one is engaged, thereafter, there cannot be change in the service conditions to his dis-advantage. But it does not necessarily mean that the person who is appointed can claim the benefit or benefits which are to be given to others in view of subsequent development or persons appointed with service conditions which may be different. Mr. Vin submitted that even in the case of service conditions of employees of a nationalised Bank, regulations are providing different age of retirement. He submitted that Punjab National Bank (Officers) Service Regulations, 1979, provides different age of retirement as under :-

1. An officer employee of the Bank recruited /promoted prior to 19th July, 1969 shall retire on completion of 60 years of age.
2. An officer employee of the Bank recruited prior to 19th July, 1969 but promoted as an officer on or after 19th July,1969 shall retire on completion of 60 years of age.
3. An officer employee of the Bank recruited as an award staff or an officer employee on or after 19th July,1969 shall retire on completion of 58 years of age."

He submitted that in case of Punjab National Bank v/s K.C. Chopra and another, AIR 1997 SC 3234, the Apex Court distinguished Nakara's case and the court pointed out that Nakara's case, was a special case as it was agreed that he would retire at the age of sixty years. In the case of Railway Board v/s A. Pitchumani (supra), rule 2046(b) was considered. In that case, there was no

controversy that the employee held the permanent post in the company on March 31, 1938 and under amended rules, he was entitled to continue in service till he attained the age of sixty years as per clause (b) read with note thereto. Rule 2046 along with the note reads under :-

"2046 (FR 56) - (a) Except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of fifty-eight years.

(b) a ministerial railway servant who entered government service on or before the 31st March, 1938 and held on that date -

(i) a lien or a suspended lien on a permanent post, or

(ii) a permanent post in a provisional substantive capacityi under Clause (d) of the Rule 2008 and continued to hold the same without interruption until he was confirmed in that post

shall be retained in service till the day he attains the age of sixty years.

NOTE

" For the purpose of this Clause, the expression "Government Service" includes service rendered in ex-company and ex-State Railways, and in former Provincial Government."

In view of this, a ministerial railway servant who had entered government service on or before March 31, 1938 and who satisfied the conditions mentioned in sub clause (i) or (ii) of clause (b), had a right to continue in service till he attains the age of 60 years and expression "government service" included the persons who rendered services in ex-Company, ex-State Railways and former Provincial Government. In the instant case, petitioner joined services after March 31, 1938 and this fact is required to be kept in mind.

It appears that on December 12, 1967, the expression used in note as aforesaid viz. expression "Government Service" was deleted and in its place, by an order dated December 23, 1967 together with the New Note followed which is as under :-

" For the existing note, substitute the following:

For the purpose of this clause the expression "Government Service" includes service

rendered in a former Provincial Government and in ex-Company and ex-State railways, if the rules of the Company or the State had a provision similar to Clause (b) above."

Thus, from the New Note abstracted above, expression "Government Service" was changed. In view of substituted Note, so far as employee in that case was concerned, though he was entitled to continue in the service up to the age of sixty years as per Clause (b) read with Note thereto under Rule 2046 which was substituted on January 11, 1967, he was entitled to work up to the age of sixty years only if a Company had a provision similar to Clause (b) of Rule 2046. The Court pointed out that as an employee of a Company, he had no right to continue in service till he attained age of sixty years. Old Rule was amended and in view of New Rule, he was entitled to continue till he attained age of sixty years. Thus, it is very clear that in December 1967, New Note to the Rule substituted the Note which was prevailing at the relevant time as a result of which the employee was entitled to serve upto 60 years if there was a clause akin to Clause (b) of Rule 2046 when originally he was appointed by the Company. From this, it is very clear that change was sought to be made subsequently

after giving benefit to him and inclusion of Note was to his disadvantage.

As new note to clause (b) dated December 23,1967 created distinction between the two, the question arose. Because of addition of new note, though employee was entitled to continue in service till he attains the age of 60 years, was required to retire at the age of 58 years because provision similar to Clause (b) did not exist in service conditions of the company. Thus, in view of amended Rule on January 11, 1964, he was to be retained in service till he attains the age of 60 years. However, benefit was sought to be denied again by amending the rule on December 12, 1967 and by substituting a note by an order dated 23rd December 1967.

So far as the present case is concerned, there is no such note in Rule 2046(e). The Apex Court considered the decision of Kailashchandra v/s Union of India, reported in AIR 1961 SC 1346, wherein the Apex Court pointed out that there was a reasonable classification of ministerial servant who had been retired under Rule 2046(2)(a) on attaining the age of 55 years into two Clases: one class consisting of those who had been retired after September 8, 1948; and the other consisting of those who retired upto September 8, 1948. The Apex Court held that there was no denial of equal protection

of laws guaranteed by Article 14 of the Constitution. In later case i.e. in the case of Union of India v/s A. Pitchumani (supra), in para-19, Court pointed out that the Court in earlier case of Kailashchandra (supra) had no occassion to consider the problem that arose by virtue of new note added to Clause (b) of Rule 2046. Thus, it is in view of this new note Court decided the question. So far as Clause (e) of Rule 2046 is concerned, the same is unamended and thereore classification cannot be said tobe violative of Article 14 of the Constitution.

In case of N.S. Vatsraj (supra), Division Bench of this High Court after considering Rule 56(b) of Fundamental Rules, (subsequently amended and read as Rule 56(c)) which is similar to Rule 2046(b) of the Rules, pointed out that in that case, dispute between the parties centered round a narrow question namely whether it could be said that the employee had entered the government service on or before 31.3.1938 or in other words, when he entered service of former princely State of Morvi, he could be said to have entered the government service within the meaning of fundamental Rule 56(c). The Court in the instant case is concerned with Rule 2046(e). When originally in the cadre concerning said Rule persons who were employed by different State Railways or Company or Provincial Government, according to the rules prevailing in that State or the Rules which were ordinarily being followed by ex-Company or ex-State Railways or Provincial Governments as a result of which in some States, age of superannuation might be 58 years and in some States, it might be of 60 years. The effect of sub-clause (e) makes it clear that if employee in Class :IV service or post who prior to 1st December, 1962 was entitled to serve upto the age of sixty years for the reasons aforesaid, then he was to superannuate at that age. If in certain States or ex-Railway or ex-Company, the age of superannuation was 58 years, then as per rule 2046(a), on attaining age of 58 years, person was to be superannuated.He will not be protected by any exception. It is because of clause (e), an exception is carved out to protect that employee who was entitled to work up to the age of 60 years. It does not mean that those employees in whose service conditions age of superannuation was 58 years, can insist that age of superannuation should be of 60 years in their case also. So far as new entrants are concerned, it was made clear that the age of superannuation would be 60 years if that entrants are falling in Class:IV. In clause (e), there is no reference to a note as we find in clause (b) of Rule 2046 for the purpose of government service which would include services rendered in former princely States, ex-Company, ex-Railway or ex-State service. In

any case, if the petitioner has rendered service, in view of the change of circumstances, services were taken over and at that point of time, whatever service conditions were there, it appears that those service conditions were protected and that is why we find exception and clause (e) specifically refers that despite clause (a), servant though was to retire on the day he attains the age of 58 years, he shall continue to serve upto 60 years if he was entitled otherwise to serve upto the age of 60 years. That is obvious because of service condition when he entered the service. Protection is given by this exception to the persons who were entitled to serve upto 60 years because of initial appointment. In case of Karoo (supra), Patna High Court considering Rule 2046(b), struck down offending portion of Rule 2046(e). There is no similarity in both sub-clauses.

Mr. Rana, learned counsel submitted that in the instant case, it was not necessary for him to challenge vires of Rule 2046(e) because Patna High Court has decided that Rule is ultra vires and as a consequence,

benefit ought to have been given to him and it was not necessary to challenge the said rule before this Court and simply he prayed that he could not have been retired on attaining age of 58 years. As against this Mr. Vin, learned counsel for the respondent submitted that the employer cannot make any change in the service condition which may be adverse to him without following the procedure. He submited that if for the same categories if others are to be employed and if service conditions (i.e. age of superannuation) of others which are to be employed are different than those who are already employed later on, cannot make a grievance because with open eyes, they are accepting the services. In the same way, he submitted that the person who was appointed, cannot make any grievance in case if subsequent appointments which are made have more favourable service conditions (i.e. age of superannuation). In nut-shell, he submitted that so far as the appellant is concerned, he was to superannuate at the age of 58 years and merely because in some different agency those who were appointed and as per their service conditions they were tobe superannuated at the age of 60 years and those who were to be appointed after the date were to be superannuated at the age of 60 years, appellant cannot say that he should be given that benefit. In the case of Punjab National Bank (supra), regulations provided three different categories which we have mentioned in the earlier part of this decision. Respondent in that case was not an employee of the Bank prior to 19.7.1969 and he was not entitled to claim benefit of retirement at the

age of 60 years. Letter of appointment which was issued by the Bank to the respondent in that case clearly indicated that he was absorbed as an employee of the Bank with effect from 10.3.1972. All the rules and regulations of the Bank became applicable to him from 10.2.1972. He, therefore, cannot be considered as an employee/officer of the Bank recruited prior to 19.7.1969. Apex Court has pointed out that in view of this, High Court was not right in giving benefit of retirement age of 60 years to the said employee Mr. Chopra.

In our view, there is no similarity in Rule 2046(b) and 2046(e). Rule 2046(b) was amended earlier so as to raise the age of superannuation upto 60 years. That benefit was sought to be taken away by substituting the Note. What ever the provisions were at the relevant time or amended subsequently in so far as Rule 2046(b) is concerned, cannot be read in Rule 2046(e). In our opinion, it is only because of change made in note on December 27,1967 in Rule 2046(b), the Apex Court pointed out that object was to provide uniform retirement age of the Class falling in Clauses (i) or (ii) of Rule 2046(b), subsequently carving out a category, had no nexus or relation to the object of the rule. While in the instant case, reading Rule 2046(e), there is nothing to show that at any time attempt was made to provide uniform age of superannupation and thereafter change was made.

Learned Single Judge has considered the decision in the case of Karoo (supra). Learned Single Judge has pointed out that in the case of Karoo (supra) age of superannuation originally stood was 55 years which was subsequently raised to 58 years and, therefore, except those railway servants who were in service on 1.12.1962 and were entitled to serve upto the age of 60 years, could be retained in service beyond the age of 58 years. The Court considered the effect of the note in the case of Railway Board v/s A. Pitchumani (supra) and the learned Single Judge was of the view that ".....I am afraid that the effect of this decision of Patna High Court would be that the provisions contained in clause (a) and surviving clause (b) of rule 2046 would be repugnant to each other and the same cannot stand together. Apart from this difficulty, in the facts of the case before Patna High Court the employee was working as a peon in the office and, therefore, possibly be included in the category of ministerial servants." Learned Single Judge also pointed out that "....since the

petitioner has not averred anything in the petition, much less established that he had entered the Railway service in the category of servants to which the benefit of the decision of the Supreme Court can be applied and clearly, therefore, he would not be entitled to claim the benefit either under rule 2046(b) or rule 2046(e) since rule 2046 as substituted on January 11, 1967 provided in the main enactment in clause (a) that except as otherwise provided in this rule, every railway servant shall retire on the day he attains the age of 58 years."

In view of what we have discussed herein above, the case of the appellant is not governed by rule 2046(b) or the principles which may be culled out from that rule

and the case of the petitioner is not governed by rule 2046(e) which is in the nature of exception and hence the appellant has been rightly superannuated at the age of 58 years and, therefore, we find no merits in this appeal and hence appeal stands dismissed with no orders as to costs.

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